

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 324 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

PUNAM OMKAR MARWADI

Versus

STATE OF GUJARAT

Appearance:

MR. P.M. VYAS, advocate for the appellant.

MR. S.R. DIVETIA, A.P.P. for the respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

(July 2, 1996)

ORAL JUDGMENT : (Per: Panchal, J.):-

By means of filing this appeal under section 374 of the Code of Criminal Procedure, 1973, the appellant has challenged legality and validity of judgment and order dated May 25, 1989 rendered by the learned Additional

Sessions Judge, Court no.20, Ahmedabad, in Sessions Case no.75/89 convicting the appellant under section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act,1985 ("NDPS Act" for short) as well as section 66(1)(b) of the Bombay Prohibition Act,1949 and sentencing him to R.I. for 10 years and fine of Rs.1 lac i/d. R.I. for six months for the offence punishable under section 20(b)(ii) of the NDPS Act as well as R.I. for three months and fine of Rs.500/- i/d. R.I. for 15 days under section 66(1)(b) of the Bombay Prohibition Act. Both the substantive sentences are ordered to run concurrently.

The prosecution case in short is that on August 31,1988 Mr. S.N.Patil, the then Police Inspector, Gaikwad Haveli Police Station and other police personnel were on patrolling. At about 9.45 P.M. when they came near Jamalpur Police Station, Mr.Patil received an information that near Munda Darwaja one person wearing black gown and white lungi was collecting and soliciting bets in contravention of provisions of the Bombay Prevention of Gambling Act. On receiving information, Mr.Patil requisitioned services of two panch witnesses and conveyed the information received by him to them. The raiding party which also consisted of other police personnel and panch witnesses thereafter proceeded in government vehicle. The vehicle was stopped near Hebatkhan's Masjid. Therefrom the raiding party went on foot and when it reached near Munda Darwaja, a person standing on the foot-path wearing black gown and white lungi was noticed with a customer. The Police Inspector and other police personnel with panchas went near the place where said person was standing. However, the customer ran away, but the person wearing black gown and white lungi was apprehended. On interrogation, he gave his name as Punam Omkar Marvadi, who is the present appellant. His person was searched in presence of panch witnesses. The search of the pockets on gown resulted into find of slips bearing figures of betting, currency notes worth Rs.589/- and 13 grams substance smelling like charas. On demand, the appellant could not produce any pass or permit authorising him to possess charas. Therefore, sample of charas as well as slips bearing figures of satta-betting and currency notes were seized, packed and sealed in presence of panch witnesses. Necessary panchnama was also prepared in presence of panchas and their signatures were obtained on the panchnama. Mr. Patil then lodged his complaint against the accused. Two separate cases were registered against the appellant. One for the offence punishable under the provisions of the Bombay Prevention of Gambling Act and

another for the offences punishable under the provisions of NDPS Act as well as the Bombay Prohibition Act. The investigating officer recorded statements of witnesses. The investigation into the complaint lodged by Mr. Patil was carried out initially by Mansingbhai Devjibhai Chaudhari the then P.S.I. discharging duties at Gaikwad Haveli Police Station and thereafter by Manubhai Bhikhabhai Solanki, also a P.S.I. discharging duties at the said Police Station. At the conclusion of investigation, the accused was chargesheeted under section 20(b)(ii) of the NDPS Act as well as sections 65A and 66(1)(b) of the Bombay Prohibition Act. In view of provisions of the NDPS Act, the case was committed to Sessions Court for trial. The learned Additional Sessions Judge, Court no.20, Ahmedabad framed charge at exh.1 against the appellant under section 20(b)(ii) of NDPS Act and sections 65(A) & 66(1)(b) of the Bombay Prohibition Act. The charge was read over and explained to the appellant. The appellant pleaded not guilty to the charge and claimed to be tried. Therefore, prosecution examined following witnesses, in order to prove its case against the appellant :-

- (1) Jamnadas Kanjibhai Vaishnani, PW.1, ex.5
- (2) Smt. Rajnikantaben Narendrakumar Sha, PW.2, ex.11
- (3) Shankarrao Namdevrao Patil, PW.3, ex.13
- (4) Abdulrasul Abdulmajid Shaikh, PW.4. ex.17
- (5) Harshadsinh Pratapsinh, PW.5, exh.19
- (6) Narendrakumar Babulal, PW.6, Ex.21
- (7) Mansih Devjibhai Chaudhari, PW.7, ex.22
- (8) Gobarbhai haribhai, PW.8, ex.23
- (9) Punjabhai Shahbhai, PW.9, ex. 26
- (10) Manubhai Bhikhabhai Solanki, PW.10, ex.28.

The prosecution also relied on documentary evidence such as, complaint ex..15, seizure panchnama ex.14, report of the analyst etc. to prove its case against the appellant.

3. After recording of evidence of prosecution witnesses was over, learned Judge recorded statement of the appellant under section 313 of the Code of Criminal Procedure, 1973. The appellant in his statement under section 313 of the Code stated the case of the prosecution to be false, but admitted that Rs.589/- were recovered by police from his pocket. However, the appellant did not lead any evidence in his defence. After appreciating the evidence led by the prosecution, learned Judge recorded following conclusions :-

- (1) The prosecution has proved beyond reasonable doubt that charas weighing about 13 grams was found from the possession of the appellant in

presence of independent panch witnesses on August 31,1988 at about 11.30 P.M. near Munda Gate, Jamalpur, Ahmedabad.

- (2) Muddamal remained intact and in sealed condition and no mischief was committed with regard to the muddamal before it was analysed.
- (3) The prosecution has proved that substance found from the possession of the appellant is a narcotic substance as defined under the NDPS Act and is an intoxicated drug as defined in the Bombay Prohibition Act.
- (4) The appellant is guilty of offence under section 20(b)(ii) of the NDPS Act and section 66(1)(b) of the Bombay Prohibition Act.

In view of the above referred to conclusions, the learned Judge convicted the appellant under section 20(b)(ii) of the NDPS Act as well as section 66(1)(b) of the Bombay Prohibition Act and imposed sentences which have been referred to hereinabove, but acquitted the appellant of the offence punishable under section 65(A) of the Bombay Prohibition Act.

4. Mr. P.M.Vyas, learned Counsel for the appellant has taken us through the entire evidence on record. On behalf of the appellant, it was submitted that though prior information was received by Mr.Patil, he had failed to comply with the provisions of section 42(1) as well as section 42(2) of the NDPS Act and, therefore, the impugned judgment deserves to be set aside. It was emphasised by the learned Counsel for the defence that before carrying out search of the person of the appellant, Police Inspector Mr. Patil had failed to inform the appellant that he had a right to be searched in presence of a Gazetted Officer or a Magistrate and thus, mandatory provisions of section 50 having been violated, the appeal should be allowed. Lastly, it was argued on behalf of the appellant that there is no satisfactory evidence on record of the case to indicate that muddamal was kept in safe custody till it reached Analyst for analysis and, therefore, there being possibility of tampering with muddamal article, the appeal should be accepted.

5. Mr. S.R.Divetia, learned A.P.P. contended that the evidence of (i) Mr. S.N.Patil, PW 3 ex.13, (ii) Mr.A.A.Shaikh, PW.4, ex.17, (iii) Harshadsinh Pratapsinh, PW.5, ex.19 read with panchnama ex.14 and complaint ex.15 establish beyond reasonable doubt that charas was found from possession of the appellant on August 31,1988 and he had no pass or permit authorising him to possess charas.

It was asserted on behalf of the State Government that this is a case of chance recovery of narcotic substance and, therefore, neither the provisions of section 42 nor the provisions of section 50 of NDPS Act would be applicable to the facts of the case. Learned Counsel for the State Government emphasised that evidence of prosecution witnesses, namely, (i) Gobarbhai Haribhai, PW.8, ex.23, (ii) Punjabhai Shahbhai, PW.9, ex.26 and (iii) Narendrakumar Babulal, PW.6, ex.21 read together with the evidence of (i) Smt. Rajnikantaben N.Shah, PW.2, ex.11 and (ii) Jamnadas Kanjibhai Vaishnani, PW.1, ex.5, and the report of Analyst indicate that the muddamal article remained in safe custody and in sealed condition and there was no possibility of tampering it all till it was sent for analysis. It was pleaded on behalf of the respondent that having regard to the evidence on record, conviction recorded as well as sentences imposed are eminently just and proper and, therefore, the appeal should be dismissed.

6. The fact that charas weighing 13 grams was found from possession of the appellant on August 31, 1988 at about 11.30 P.M. near Munda Gate, Jamalpur, Ahmedabad is amply proved by the prosecution beyond shadow of doubt. The evidence of Shankarrao Namdevrao, PW.3, ex.13 shows that on August 31, 1988 he together with other police personnel was on patrolling duty and had come near Jamalpur Police Chowkey at about 9.45 P.M. His evidence on oath clearly indicates that he had received an information that near Munda Gate one person wearing black gown and white lungi was collecting and soliciting bets in violation of provisions of the Bombay Prevention of Gambling Act. His evidence further manifests that on receiving information he had requisitioned services of two independent panch witnesses and carried out raid in presence of said witnesses. This witness has stated on oath before the Court that when the raiding party reached Munda Gate, Jamalpur, Ahmedabad, the appellant was found with a customer and the customer ran away on seeing raiding party, but the appellant was apprehended. His evidence in no uncertain terms proves that in presence of panch witnesses, person of the appellant was searched and currency notes of Rs.589/-, slips bearing figures of satta-betting and 13 grams charas were recovered from the pocket of his gown. In his evidence this witness has further testified that on demand the appellant could not produce pass or permit authorising him to possess charas and, therefore, the articles found from the pocket of the gown were seized. The witness has also deposed before the Court that sample of charas was packed and sealed in presence of panch witnesses and slips bearing signatures

of the panchas were affixed on the packet containing muddamal charas. The witness has deposed on oath that slips bearing figures of satta-betting and currency notes were also seized and sealed and thereafter two separate cases were registered against the appellant.

7. The evidence of Mr. Patil gets ample corroboration from the contents of the complaint lodged by him which is produced on record at exh.15. It is relevant to note that complaint was filed by him immediately without loss of time. Though this witness is searchingly cross-examined on behalf of the appellant, nothing has been brought on record to discredit him. While carrying out raid, this witness was performing official duty. It is not even suggested that he had any grudge against the appellant. On overall view of the matter, we are of the opinion that his evidence is reliable as well as truthful and the trial Court has not committed any error in placing reliance on his evidence. In order to lend corroboration to the evidence of Mr. Patil, prosecution has examined witness Abdulrasul Abdulmajid Shaikh at exh.17, who had acted as one of the panch witnesses at the time of find of charas from one of the pockets of gown worn by the appellant. This witness has clearly stated that on August 31, 1988 he had acted as one of the panch witnesses and on person of the appellant being searched, charas weighing about 13 grams was found from the pocket of gown put on by the appellant in his presence and others. In his evidence before the Court this witness has confirmed the contents of the panchnama exh.14 wherein all details are recorded. This witness is also cross-examined at length on behalf of the appellant. However, nothing has been brought on record of the case so as to doubt his version given before the Court.

Again, prosecution has relied on the evidence of Police Constable Harshadsinh Pratapsih, PW.5, ex.19, to prove its case against the appellant, as he was one of the members of raiding party and in his presence 13 grams of charas was found from one of the pockets of gown worn by the appellant. Witness Harshadsinh Pratapsinh has also in no uncertain terms stated in his evidence that person of the appellant was searched in his presence as well as in presence of panch witnesses by Police Inspector Mr. Patil, on 31.8.1988 near Munda Gate, Jamalpur and 13 gram charas was found from one of the pockets of the gown worn by the appellant. This witness is also cross-examined on behalf of the appellant, but nothing is brought out to shake his credibility. On the facts and in the circumstances of the case, we are of the view that the finding recorded by the learned Judge that prosecution has proved beyond reasonable doubt that

charas weighing about 13 grams was found from the possession of the appellant on August 31, 1988 at about 11.30 p.m. near Munda Gate, Jamalpur, Ahmedabad, is eminently just and proper and deserves to be upheld.

8. The submission that Police Inspector Mr. Patil did not comply with the mandatory provisions of sections 42(1), 42(2) as well as section 50 of the NDPS Act and, therefore, the appeal deserves to be allowed, has no substance. The evidence on record clearly indicates that Police Inspector Mr. Patil had received an information relating to commission of offence punishable under the provisions of the Bombay Prevention of Gambling Act. The evidence on record does not even suggest that any information was received by P.I. Mr. Patil that the appellant was in possession of prohibited substance in violation of the provisions of NDPS Act. The defence has not suggested to any of the prosecution witnesses that P.I. Mr. Patil had reason to believe from personal knowledge that the appellant was possessing prohibited substance in breach of provisions of NDPS Act. As there was no information as contemplated by section 42(1) of NDPS Act, it could not have been reduced into writing nor the information could have been sent by P.I. Mr. Patil to his immediate official superior as required by Section 42(2) of the NDPS Act. Having regard to the circumstances of the case, we are of the view that provisions of section 42 of NDPS Act are not applicable to the facts of the case at all. As held earlier, the evidence does not show that any information was received by Mr. Patil to the effect that the appellant was in possession of narcotic drug or psychotropic substance in contravention of provisions of the NDPS Act. While carrying on investigation including search, seizure etc. empowered under the provisions of Code of Criminal Procedure with reference to an offence punishable under the Bombay Prevention of Gambling Act, P.I. Mr. Patil had no idea that search of the person of the appellant would result into find of charas also. Therefore, there is no manner of doubt that this is a case of chance recovery of charas from possession of the appellant. What is the effect of chance recovery of narcotic drug or psychotropic substance is considered by the Supreme Court in the case of State of Punjab v. Balbir Singh, A.I.R. 1994 S.C. 1872. The Supreme Court has ruled that if a police officer carrying on investigation including search, seizure or arrest empowered under the provisions of the Code of Criminal Procedure comes across a person being in possession of narcotic drugs or psychotropic substance, then there is no question of resorting to section 50 of the Act. The Supreme Court has emphasised

that if the police officer carrying on investigation is one of those empowered officers under the NDPS Act, then he must follow thereafter the provisions of NDPS Act and continue the investigation as provided thereunder. The Supreme Court has further held that if on the other hand, he is not empowered, then the obvious thing he should do is that he must inform the empowered officer under the NDPS Act who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. In view of the clear pronouncement of law by the Supreme Court, we are of the view that it was not necessary for Mr. Patil to follow the procedure laid down in section 50 of the NDPS Act because Mr. Patil had not received an information relating to commission of offence punishable under the provisions of NDPS Act. When P.I. Mr. Patil effected the search, he was completely oblivious of the possession of any narcotic drug or psychotropic substance by the appellant. The fact of possession of the narcotic substance by the appellant, came to his notice only after search of the person of the appellant resulted into find of narcotic substance also. It is not in dispute that P.I. Mr. Patil who made search of the person of the appellant was a Gazetted Officer and had followed procedure of NDPS Act after noticing possession of narcotic substance by the appellant. As laid down in Section 50 the steps contemplated thereunder, namely, informing and taking the accused to the Gazetted Officer should be done before the search. When the search is already over in the usual course of investigation under the provisions of the Code of Criminal Procedure, then the question of complying with section 50 of the NDPS Act would not arise. On the facts and in the circumstances of the case, we are of the view that provisions of sections 42 and 50 of the NDPS Act are not applicable to the facts of the present case and, therefore, the impugned judgment cannot be reversed on the ground that those mandatory provisions have not been complied with by Police Inspector Mr. Patil. The first submission advanced on behalf of the appellant therefore, fails and is rejected.

9. The assertion that evidence led by the prosecution does not establish beyond reasonable doubt that packet containing muddamal charas was kept in proper custody till it reached the public analyst for analysis and there was possibility of tampering, has no factual basis. The evidence of witness Gobarbhai Haribhai PW.8, ex.23 shows that on August 31, 1988 he had received muddamal packet in a sealed condition and he had kept it in a government box which was locked from outside. His evidence also indicates that along with the said

muddamal, he had also kept slips relating to betting and cash found from the person of the appellant. In support of his say, this witness has produced page 176 of the counter receipt which proves that the witness had received muddamal article in a sealed condition on August 31,1988. The evidence of this witness further manifests that the sealed packet containing muddamal charas was handed over to crime writer by him on September 3,1988. The evidence of witness Punjabhai Shahbhai ex.26 shows that at the relevant time he was discharging duties as Head Constable cum Crime Writer at Gaikwad Haveli Police Station. After looking to the contents of receipt exh.24, this witness has deposed before the Court that he had received sealed packet containing muddamal charas on September 3,1988 and had signed receipt exh.24. This witness has further testified that on September 9,1988 sealed packet containing muddamal charas was handed over to police constable Narendrakumar Babulal to enable him to carry it to Forensic Science Laboratory for the purpose of analysis. The witness has asserted on oath before the Court that Entry no.175 on page 158, ex.27 is signed by him indicating that he had handed over sealed packet containing muddamal charas to police constable Narendrakumar Babulal on September 9,1988. The witness in no uncertain terms has stated that muddamal charas was received by him on September 3,1988 intact and in a sealed condition and he had handed over the same in sealed condition to constable Narendrakumar Babulal. Though this witness has been cross-examined at length, nothing has been brought on the record of the case to doubt version of this witness as given in the examination in chief.

The evidence of witness Narendrakumar Babulal, PW 6 ex.21 shows that at the relevant time he was discharging duties as police constable, Gaikwad Haveli Police Station and had received sealed packet containing muddamal charas on September 9,1988 from Gaikwad Haveli Police Station for sending it to Forensic Science Laboratory. He has clearly stated in his evidence that he had carried the said packet to Forensic Science Laboratory and handed over the same to Analyst for the purpose of analysis. Though this witness is cross-examined searchingly, nothing is brought on record of the case to shake his version.

The evidence of Manubhai Bhikhabhai Solanki, PW.10 ex.28 proves that at the relevant time he was discharging duties as Police Sub Inspector, Gaikwad Haveli Police Station and had sent sealed packet containing muddamal charas to Forensic Science Laboratory through Police

Constable Narendrakumar along with a forwarding letter bearing specimen seal which was applied on the sample. This witness has produced the receipt issued by Police Constable Narendrakumar for having received the sample at ex.6. The fact that this witness had handed over sealed packet containing muddamal charas to police constable Narendrakumar for being carried to Forensic Science Laboratory is amply proved by his evidence.

The evidence of Jamnadas Kanjibhai Vaishnani, PW.1, ex.5 clearly shows that at the relevant time the witness was discharging duties as Senior Scientific Assistant cum Chemical Examiner at the Forensic Science Laboratory, Ahmedabad and had received a sealed packet sent by Gaikwad Haveli Police Station. The witness has further testified that he had compared seals on the packet containing muddamal articles with specimen seal and found them to be similar. The witness has clearly stated on oath that sealed packet containing muddamal charas was intact. The witness has produced report of the analysis indicating that the substance examined was charas. Though this witness has been cross-examined at length, nothing has been shown on behalf of the defence that the witness is not a truthful witness. The above discussion would indicate that the prosecution has led cogent and convincing oral as well as documentary evidence to establish the fact that sealed packet containing muddamal charas was properly kept in safe custody and there was no possibility of the sample having been tampered with at all. The submission that the evidence of Jamnadas Kanjibhai Vaishnani indicates that two seals were applied while sealing the packet containing muddamal charas and, therefore, benefit of doubt should be given to the appellant, has no merits. This witness has stated on oath that along with forwarding letter two specimen seals were sent. This is so stated by the witness in para-7 of his deposition. He has not stated in his evidence any where that he had found two seals on the packet containing muddamal charas. We ourselves have perused the forwarding letter which is at exh.10. The evidence of Punjabhai Shahbhai, PW.9, ex.26 indicates that impression of one specimen seal was faint and, therefore, another specimen seal was affixed on the forwarding letter. This was obviously done in order to enable the Public Analyst to compare the specimen seal impression with the seal affixed on the packet containing muddamal charas. The submission that the packet containing muddamal charas had two seals, is factually incorrect and, therefore, will have to be rejected. By examining the material witnesses, the prosecution has ruled out possibility of sample being

changed or tampered with during the relevant time. On the facts and in the circumstances of the case, we are of the view that prosecution has proved beyond reasonable doubt by leading cogent and reliable evidence that right from the stage of seizure of charas upto the time when the sample was handed over to the Public Analyst, the muddamal sample was kept in safe custody and seals thereon remained intact. The trustworthy evidence led by prosecution has completely ruled out any possibility of sample muddamal having been tampered with. The second submission also, therefore, fails and is rejected.

10. Except the above referred to submissions, no other submission has been advanced on behalf of the appellant. On overall view of the evidence on record of the case, we are of the opinion that the learned Judge has committed no error in convicting the appellant under section 20(b)(ii) of the NDPS Act and section 66(1)(b) of the Bombay Prohibition Act. It may be mentioned that possession of charas which is an intoxicating drug, is made an offence punishable under the provisions of the Bombay Prohibition Act and, therefore, conviction of the appellant under section 66(1)(b) of the Bombay Prohibition Act is also well founded. Having regard to the statutory provisions contained in section 27 of the NDPS Act, the learned Judge has imposed minimum sentence prescribed and, therefore, no exception can be made to the sentence imposed by the learned Judge. As the view taken by the learned Judge is legal and based on evidence led by the prosecution, the appeal will have to be rejected.

For the foregoing reasons, we see no merits in the appeal. The appeal therefore, fails and is dismissed.
